do I find that he could not succeed in an action for 'specific performance'. That being so he can have no 'beneficial interest' in Lot 1078 or Lot 1079 and thus do I order that the caveat be removed from all three lots.

I would but add that whilst I feel disturbed to think that the applicant here would appear to be in a position to get a great deal for nothing I cannot help but consider that the respondent's mismanagement of the building work has been largely responsible for the inordinate delay in completion.

Application granted.

TAN BOON HENG v. ORIENTAL FIRE & GENERAL INSURANCE CO. LTD. & ORS.

[F.C. (Azmi C.J. (Malaya), Ismail Khan & Gill JJ.) December 14, 1967]

[J.B. — Federal Court Civil Appeal No. X. 10 of 1967]

Practice and Procedure — Third party direction — Application for — Refusal by trial judge — R.S.C. 1957, O. 16A rr. 1(1)(c), 7(1)(a).

Insurance — Third party — Liability.

The 1st respondents sought a declaration that a policy of insurance they made with the appellant should be avoided on the ground that certain facts disclosed by the defence which formed part of the contract of the insurance were not true, and the appellant on the other hand alleged that if those facts were untrue he did not give them to the company. The untrue facts were supplied by the third party (2nd respondents) who were acting at that time both as the agent of the 1st respondents and the appellant and who were aware that those facts were untrue. The appellant applied for leave to issue a third party notice against the 2nd respondents. Upon the dismissal of the application by the learned trial judge he appealed.

Held, allowing the appeal: the application for a third party order was a matter which could come under R.S.C. O. 16A r. 1(1)(c) because the question that the court would be asked by the defendant (appellant in this appeal) to decide was a matter which was substantially the same as the question which the plaintiff (1st respondents herein) is asking the court to consider in his suit against the defendant.

Case referred to:—

(1) *Carpenter* v. *Ebblewhite* [1939] 1 K B. 347.

FEDERAL COURT.

Denis Murphy for the appellant.

D. G. Ironside for the 2nd respondent.

Cur. Adv. Vult.

Azmi C.J. (Malaya): This is an appeal against the refusal of the judge at Johore Bahru to make third party directions applied for by the appellant.

It is necessary to set out the relevant facts.

In September 1963, Junaidah binte Haji Abdul Rahman (widow) and Haji Abdul Rahman bin Haji Hassan, the administratrix and co-administrator respectively of the estate of one Abdul Hadi bin Haji Abdul Rashid, deceased, commenced proceedings, Civil Suit No. 115 of 1963 in the High Court at Johore claiming damages against one Chua Han Piow on the ground that the death of the deceased Abdul Hadi bin Haji Abdul Rashid was caused by the negligent driving of the said Chua of a Hillman motor car belonging to Tan Boon Heng.

In November 1963, before the above-mentioned action commenced, Oriental Fire and General Insurance Co. Ltd., (the respondents in this appeal but hereinafter referred to as the plaintiffs) as insurers, within the meaning of section 76(1) of the Road Traffic Ordinance in reference to a policy of insurance for third party risk in respect of the said Hillman motor car brought a suit against Tan Boon Heng, (hereinafter referred to as the defendant) for a declaration that they (the insurance company) are entitled to avoid the said insurance policy.

The action brought on behalf of the said estate of Abdul Hadi bin Haji Abdul Rashid had since been concluded and judgment was given against the said Chua Han Piow. Chua Han Piow was driving the Hillman car when the accident took place with the consent or authority of the said Tan Boon Heng.

In the suit Johore Bahru High Court Civil Suit No. 171/63, the grounds upon which the plaintiffs sought to avoid the policy may be briefly stated as follows. It was alleged in the statement of claim that the defendant in answer to the following questions set out in the proposal form and declaration gave the answers thereto as follows:—

(1) In answer to question: "Has any company or underwriter in respect of insurance of any motor vehicles cancelled your policy?" To that the defendant stated "NIL".

(2) In answer to question: "Have you ever made a claim under any motor vehicle policy. If so please give particulars". The answer to that was "No."

(3) In answer to question: "Are you now or have you ever been insured in respect of any motor vehicle? Name of previous insurance company, policy No. or vehicle No." The answer given by the defendant was "No."

The plaintiffs alleged further that the defendant had previously been insured in respect of the said Hillman Minx car by New India Assurance Co. Ltd. under policy No. 615/04/15967/61 which said policy was cancelled by the said company and that the claim for $700 was made by the defendant against the said insurance company on the 9th July 1961 and paid on the 4th August 1961.

It was also alleged that it was provided by the recital of the said policy that the said proposal form and declaration should be the basis of the said policy and should be deemed to be incorporated therein.

The plaintiffs stated in the statement of claim that the said representation of fact contained in the said answers was false in respect of certain particulars.

It was during the currency of this policy that the said Chua Han Piow, the authorised driver of the defendant, was involved in the accident in which Abdul Hadi bin Haji Abdul Rashid was killed.

The defendant in his defence alleged that the request for the issue of the policy of insurance referred to in the statement of claim was made by him orally to Tiong Choon Co. Ltd., (by an employee thereof whose name is unknown to the defendant) as agents acting for and on behalf of the plaintiffs, and at the premises of the said Tiong Choon Co. Ltd. The defendant further stated that at the same time and place he informed the said Tiong Choon Co. Ltd., who were acting for and on behalf of the plaintiffs of the cancellation by the New India Assurance Co. Ltd., of its policy No. 615/04/15967/61.

The defendant stated that he informed both orally and by giving to the said Tiong Choon Co. Ltd. (by their said employee) the letter from the New India Assurance Co. Ltd. stating that they had cancelled or was due to cancel the said policy and a copy of the said letter was already in the hands of the said Tiong Choon Co. Ltd., it having been sent to them as owners of the said Hillman motor car. Then at the same time and place at the request of the said Tiong Choon Co. Ltd. (by their said employee) acting for and on behalf of the plaintiffs, the defendant signed a printed form which was blank, save for the printed matter therein contained which the said Tiong Choon Co. Ltd. (by their said employee) produced and after signature as aforesaid retained them for and on behalf of the plaintiffs. The said printed form contained the questions referred to in the statement of claim, but was filled in according to the defendant at a place unknown to him.

Subsequent to the filing of this suit the defendant asked for and obtained an order of the judge for leave to issue and serve a third party notice against Tiong Choon Co. Ltd. (hereinafter referred to as the third party). The application was made *ex parte*.

In the amended third party notice, the defendant claimed indemnity on the ground that the third party being under a duty to the defendant to fill in the proposal form for the said policy of insurance true answers to all questions, they, their servant or agent, knowing the true facts or alternatively without enquiring of the defendant as to the same, and without authority of the defendant, inserted the untrue answers which the plaintiffs relied on as entitling them to the declaration that the policy be avoided.

It was also claimed in the notice, that the following two issues be determined not only as between the plaintiffs and the defendants but as beween the plaintiffs and the third party:—

(1) Whether the incorrect answers which now appear in the said proposal form and relied on by the plaintiffs as aforesaid were inserted by the defendant or with the defendant's authority or by the servant of Tiong Choon Co. Ltd. or agent without the defendant's knowledge or authority or after the proposal form was delivered by the company to the plaintiffs by some other person, and

(2) Whether in all circumstances, the plaintiffs are entitled to avoid the policy.

Subsequently the matter came before the judge at Johore for third party directions. The learned judge dismissed this application and also set aside the third party proceedings.

It is against this judgment that this appeal is brought.

In his judgment the learned judge held the view that the application for third party proceedings is premature because the administrators of the estate of the deceased Abdul Hadi bin Haji Abdul Rashid had not yet brought any action in reference to the accident against the defendant. As the learned judge said "But until then the question of bringing in a third party or parties cannot possibly arise." He then went on to say, however, that in the amended third party notice the defendant described this claim as a claim for relief or remedy and designed, according to the learned judge, to bring his case within the scope of paragraph (b) of rule 1(1) of Order 16A. The learned judge, however, held the view that it is necessary to bring the matter within the scope of that paragraph; that the defendant must establish that the relief or remedy which he is claiming is one which is substantially the same as that which is claimed by the plaintiffs against him. On this point the learned judge held the view that the declaration sought by the plaintiffs is substantially different from that sought by the defendant. Apart from that he also held the view that paragraph (a) of sub-rule (1) of rule 7 of the Order requires the defendant to establish the liability of the third party before the appropriate third party direction can be made.

In reference to the second question the learned judge held the view that whether or not the plaintiffs are entitled to avoid the policy is solely a question between the defendant and the plaintiffs and one which can by no means involve any third party except described in the proviso to sub-section (3) of section 80 of the Road Traffic Ordinance. He therefore dismissed the application and also set aside the third party proceedings in the case.

Mr. Murphy for the appellant at the outset pointed out that his application before the learned judge was not under paragraph (a) or (b) of

rule 1 of Order 16A but under paragraph (c) of the same rule. Paragraph (c) reads as follows:—

"1 (1) Where in any action a defendant claims as against any other person not already a party to the action (in this Order called the third party)

(c) that any question or issue relating to or connected with the subject matter is substantially the same as some question or issue arising between the plaintiff and the defendant and should properly be determined not only as between the plaintiff and the defendant but as between the plaintiff and the defendant and the third party or between any or either of them."

In the circumstances therefore, according to Mr. Murphy, the question that the learned judge had to decide was whether the question or issue relating to or connected with the said subject matter is substantially the same as some question or issue arising between the plaintiffs and the defendant. In other words, are the two questions mentioned in his application for a third party order a matter substantially in issue between the plaintiffs and the third party. Briefly it amounts to this. The plaintiffs asked the court to avoid the policy made between them and the defendant on the ground that the answers to the questions put to the defendant were not true. The defendant now said that another person was responsible for giving all those untrue answers and that person is the third party and he therefore says this is the place where this matter can be sorted out.

Mr. Ironside for the third party if I understood him correctly supported the view taken by the learned judge namely, that the question to be decided between the defendant and the third party is premature because the administrator of the deceased had not yet brought any action against the defendant and he is not in a position therefore to ask for a contribution or indemnity from the third party. He cited to us the case of *Carpenter* v. *Ebblewhite.*[1] In that case the plaintiffs who have been injured in a collision alleged that their injuries were due to the negligence of the driver of one of the vehicles, brought an action against the registered owner of the car, the driver thereof and the insurers who had insured the registered owner and any person driving the car with his consent. As against the registered owner of the car and the driver he claimed damages and as against the insurance company he claimed for a declaration that they were obliged to satisfy any judgment obtained against the other two defendants or either of them. The master and the judge at chambers directed that the claim for declaration of liability against the insurers was to be struck off. The matter went to the Court of Appeal. The Court of Appeal dismissed the appeal on the ground that it would be wrong and entirely premature to determine in that action or even in a separate action at that time a dispute which has never as yet arisen between the parties. As Greer L.J. put it:—

"A claim by the plaintiffs for a declaration of liability against the insurance company is a claim that ought not to be entertained by the court, because at the time of the claim there was not in existence any dispute between the parties on the only question that can arise between them whether it be raised in this action or in an independant action."

In another passage this is what the Lord Justice said:—

"It seems to me that no dispute can arise between the plaintiffs and the insurance company until after the disposal of the action by the plaintiffs against the defendant Ebblewhite in favour of the plaintiffs and the establishment of a right of indemnity by Ebblewhite against the insurance company."

Mr. Ironside said the position here is the same as in that case and therefore, his client should not be added as a third party until the court has decided that the defendant is liable to pay the damages to the estate of the deceased, Abdul Hadi.

In this case the plaintiffs as the insurers have come to court for a declaration that the policy they made with the defendant should be avoided on the ground that certain facts disclosed by the defence which form part of the contract of the insurance were not true. And the defendant on the other hand, said that if those facts were untrue, he did not give them to the company. The untrue facts were supplied by the third party who were acting at that time both as the agent of the plaintiffs and the defendant and who were aware that these facts were untrue.

In my view, this application for a third party order is a matter that can come under paragraph (c) of rule 1(1) of Order 16A, because the question that the court will be asked by the defendant to decide is a matter which is substantially the same as the question which the plaintiff is asking the court to consider in his suit against the defendant.

I would therefore allow the appeal, set aside the order of the judge and send back the matter to him with direction that he make the necessary order under rule 7 of the Order 16A.

Ismail Khan and **Gill JJ.** concurred.

Appeal allowed.

Solicitors: *Murphy & Dunbar; Ironside & de Souza.*